The National League of Professional Baseball Clubs The American League of Professional Baseball Clubs *and* Major League Umpires Independent Organizing Committee, Petitioner. Cases 2–RC–22142 and 2–RD–1440

February 24, 2000

DECISION AND CERTIFICATION OF REPRESENTATIVE

CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered objections to a mail-ballot election conducted November 5–30, 1999, and the attached hearing officer's report recommending disposition of them. The election was held pursuant to a Stipulated Election Agreement. The tally of ballots shows 57 for the Petitioner, 35 for the Intervenor,[1] and none cast against the participating labor organizations. There were no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations, and finds that a certification of representative should be issued.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Major League Umpires Independent Organizing Committee and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> Included: All major league umpires employed by the Employers.
>
> Excluded: All other employees, and all guards, professional employees, and supervisors as defined in the Act.

APPENDIX

REPORT ON OBJECTIONS AND RECOMMENDATIONS

Pursuant to a Stipulated Election Agreement (the Agreement) entered into by the above-named parties and approved on October 28, 1999, an election by mail ballot was conducted during the period of November 5–30, 1999, in the following unit of employees:

> Included: All major league umpires employed by the Employers. Excluded: All other employees, and all guards, professional employees and supervisors as defined in the Act.

As will be discussed more fully in connection with the objections, the Employer and Intervenor dispute whether the 22 umpires who performed unit work through September 2, 1999, have resigned or were discharged. This issue is the subject of an arbitration hearing that is still in progress at the time of this report. The Petitioner, Intervenor, and the Employer, however, all stipulated that the 22 disputed employees were eligible to vote in the election. The parties further agreed that the stipulation of eligibility to vote was not binding on the parties in any other proceeding apart from the processing of this petition.

The tally of ballots, which was made available to the parties following the counting of the ballots on November 30, 1999, showed the following results:

> Approximate number of eligible voters.....93
> Void ballots.....1
> Votes cast for Major League Umpires Independent Organizing Committee.....57
> Votes cast for Major League Umpires' Association.....35
> Votes cast against participating labor organizations.....0
> Valid votes counted.....92
> Number of challenged ballots.....0
> Valid votes counted plus challenged ballots.....92
> Challenges are not sufficient in number to affect the results of the election.

A majority of the valid votes counted plus challenged ballots have been cast for the Petitioner.

On December 7, 1999, Major League Umpires' Association, the Intervenor or MLUA, timely filed objections to conduct affecting the results of the election. The objections assert that the National League and the American League of Major League Baseball, herein the Employer, engaged in conduct that was coercive, unlawful, and designed to interfere with the employees' free choice as follows:

> 1. By threatening to act in a disparate and harsher manner towards the employees' chosen collective-bargaining representative if that representative was the Major League Umpires' Association, while at the same time promising harmonious and beneficial bargaining with the Petitioner, the Major League Umpires Independent Organizing Committee.
>
> 2. By engaging in conduct violative of the Act by providing assistance to Petitioner during the "critical period" relevant in this matter. In particular, the Employer bargained over the terms and conditions of the employees in the unit, notwithstanding the fact that the MLUA is the collective-bargaining representative for the employees in question.
>
> 3. By engaging in conduct interfering with the free choice of the employees in the election by failing and refusing to bargaining in good faith with the MLUA during the post-petition period.
>
> In addition, Petitioner, by its officers and agents, advised employees that it had already been bargaining with the Employer, and advised employees of what it described as an already agreed-upon collective-bargaining agreement between the Employer and the Petitioner.

Pursuant to Section 102.69 of the Board's Rules and Regulations, an initial investigation of the objections was conducted under the direction and supervision of the Regional Director for Region 2. Based on the evidence obtained in the preliminary investigation, it was determined that a hearing was necessary to resolve the substantial and material issues of fact and a notice of hearing was issued on December 15, 1999. The notice of hearing on objections outlined conduct occurring within the

[1] Major League Umpires' Association is the Intervenor in this proceeding.

critical period that was asserted by the Intervenor, and generally denied by the Petitioner and Employer, that raised substantial and material factual issues best resolved on the basis of record testimony presented at a hearing. Thereafter, a hearing was conducted by me on January 4, 5, and 6, 2000, during which the parties were afforded a full and complete opportunity to be heard, to examine and cross-examine witnesses, to present evidence pertinent to the issues,[1] to make an opening argument, and to file posthearing briefs. On the entire record of this case, including my observations of the witnesses, I issue the following report

Intervenor's Objections

While the Intervenor filed three specific numbered objections, as well as a fourth unnumbered objection, its counsel argues the Intervenor's "objections" must be viewed as a seamless integrated continuity of events. The Intervenor argues that when all of the pieces of the puzzle, including events occurring both prepetition and postpetition, are put together the conspiracy hatched by the Employer to garner support for the Petitioner and erode support for the Intervenor, will come into focus. I therefore have endeavored to set forth the facts relied on by the Intervenor in chronological order as much as possible, so that the contentions raised by Intervenor may be appropriately analyzed. The Petitioner and the Employer, in addition to other legal arguments discussed below, argue to the contrary that the facts presented at hearing establish that the election atmosphere was free from any impermissible conduct by any representatives of the Petitioner or Employer or by any third parties.

The Resignation Plan

The record clearly establishes that a significant number of the approximately 70 Major League umpires opposed the choice of Richard G. Phillips, Esq., as counsel of the Major League Umpires' Association, MLUA or the Intervenor, as early as February 1999. However, in a vote taken at the annual meeting of the MLUA, Phillips was retained as counsel by a vote of about 56 to 14. It further appears that the opposition to Phillips was concentrated among umpires employed in the American League as Mark Hirschbeck was the only National League umpire to vote against Phillips in the open rollcall vote taken at the February meeting. After the vote on the retention of Phillips, the MLUA developed a strategy how to pressure on Major League Baseball to negotiate a successor collective-bargaining agreement before the collective-bargaining agreement expired on December 31, 1999. It should be noted in this regard that the expiration of the contract was to occur several months after the completion of the 1999 baseball regular season and post season that culminated in the World Series. The negotiations for the contracts in 1991 and 1995 were difficult for the MLUA to conclude. The 1991 contract was not reached until opening day of the baseball season in April 1991. The contract negotiations for the 1995 agreement were not completed until May 1995, a month into the season and after a lock out by the Employer on January 1, 1995.

On July 15, 1999, in an apparent effort to pressure the Employer to commence negotiations, the MLUA faxed the resignations of approximately 56 umpires to the presidents of the National League and American League of Major League Baseball. Without going into any of the specifics of the resignation plan of the MLUA, facts, which, in my view, are irrelevant to any issues encompassed by these objections, it appears that certain umpires opposed the plan. It further appears that the Employer, contrary to the MLUA, took the position that the resignations were not protected concerted conduct under the National Labor Relations Act. The Employer began to hire minor league umpires as replacements and the plan began to crumble as umpires started rescinding their resignations. In late July 1999, the MLUA rescinded the remaining resignations. However, it appears from the Complaint for Declaratory Judgment filed by the MLUA on July 23, 1999, that the Employer accepted some resignations but not others and 22 umpires lost their employment effective September 2, 1999.

Coble's Conversations Concerning his Status

The resignations led to several conversations between umpires in late July 1999. Most notable were the conversations between American League umpire and Crew Chief Drew Coble and several of his colleagues and with league officials. Coble had not worked as an umpire since the July 3, 1999 game in Cleveland due to the worsening condition of his wife Kim, who was suffering with cancer. Coble stayed with his family, caring for wife until her death on September 5, 1999, and for their two children. Coble testified that he never resigned his position or authorized anyone to resign on his behalf, but he acknowledged that he was a staunch supporter of Richie Phillips and the MLUA, a fact he said was publicly known. Around July 20, Coble received his first call from American League Supervisor of Umpires Marty Springstead, who called him from a game in Tampa, Florida. After inquiring into Kim Coble's health, Springstead asked Coble if he had heard about what was happening with the umpires. Coble responded that he was too busy with his wife's care to watch television or read newspapers and he had not heard from the MLUA. Springstead reported that the umpires had resigned en masse on July 14 and he was advising Coble that if he resigned he was going to lose his job. Springstead said he was in the process of calling as many umpires in the American League as he could to get them to rescind their resignations. Coble merely responded that he was a proponent of the Union and that Springstead knew where he stood.

The next call Coble received was from Joe Brinkman, a friend of 26 years. Brinkman was known as an opponent of Phillips for the previous 2 years, and would on September 10, 1999, become 1 of 14 organizers of the Petitioner, the Major League Umpires Independent Organizing Committee. Brinkman called Coble on July 24. He inquired about Coble's wife and told him that he was a friend and didn't want to see Coble get hurt. He said he had spoken to "higher ups" in baseball and if Coble disavowed the MLUA and rescinded his resignation, he would be "taken care of." Brinkman said the resignation recission had to be in the Commissioner's office by July 25. Brinkman dictated a letter for Coble to submit that would indicate the resignation was rescinded as of July 14, and that Coble agreed to work in either league. Coble asked Brinkman who the "higher ups" were. Brinkman replied that he couldn't say. Coble stated, "Joe, I haven't resigned, so I don't need your help." Brinkman was not called as a witness although he was present throughout the hearings. On examining Coble, Employer's counsel called his attention to a declaration that was signed by Coble on August 5, 1999, and submitted to the Re-

[1] In the briefs filed here no argument was raised by the parties concerning any of the rulings regarding admissibility of testimony of witnesses made by me.

gion in a previously filed unfair labor practice charge.[2] This declaration referred to Coble's conversation with Brinkman without mentioning that Brinkman suggested that Coble disavow the MLUA. In reply, Coble explained that many of the things he had told to the Union's lawyer[3] were not put forth into the statement of August 5. He did not explicitly state whether Brinkman's encouragement that Coble disavow the MLUA was among the omissions. Coble, on cross-examination, also stated that he could not be 100-percent certain that the word "disavow" was used, but clearly stated that it was his best recollection that "disavow" was the word used.

Coble also related a conversation with American League umpire John Hirschbeck in late July 1999, on a date he did not recall. Hirschbeck initially inquired into the condition of Ms. Coble. Hirschbeck then said he was a close friend of Coble and didn't want to see him get hurt. He also said that if Coble would disavow the MLUA and come over to the insurgents [sic] he would be "taken care of." Hirschbeck told Coble that he had made several calls to the Commissioner of Baseball and Coble wouldn't lose his job. Hirschbeck said they had a deal in process or in progress.

On cross-examination by Petitioner's counsel, Coble recalled there may have been other conversations that he had in July 1999 with Springstead and John Hirschbeck.[4] Coble was also cross-examined concerning a conversation he had received from Derrick Irwin, an American League official, between July 15 and 26. In that conversation Irwin asked Coble what he intended to do about his job. Coble replied he was considering whether or not to resign.

John Hirschbeck, an organizer of Petitioner, was called as an adverse witness by MLUA.[5] He stated that he called Coble to inquire about his wife's condition. He also relayed to Coble that he cared for him and his future. He states he advised Coble to rescind his resignation. Hirschbeck stated that he never told Coble that a deal has been worked out with baseball, or that he had spoken with Bud Selig, the Commissioner or that Coble would work if he disavowed the MLUA.

The record reflects that at some point in late July 22, the Employer chose to accept 22 of the resignations effective September 2, 1999, notwithstanding the subsequent letters rescinding them. The parties are still actively arbitrating whether these 22 were discharged or not and appear to have strongly held contrary convictions regarding this issue. In this regard, Intervenor Attorney Patrick Campbell testified, "[T]he fact that they've been displaced is not as a result of resignation; I suppose it would mean that they were terminated, okay? But my point is that they haven't resigned. My point was back in July, it was very clear in July that they had not resigned."

Contract Claims Relative to the 22 Umpires in Dispute

One of the Intervenor's numbered objections (Objection 3) relates to its assertion that certain contractual benefits were denied to the 22 umpires whose jobs were in dispute. It is contended that such contractual breaches constitute violations of Section 8(a)(5) of the Act and as such transmitted the message to those in the unit that their continued support for the MLUA would result in adverse treatment. The Intervenor also argues that this conduct constitutes an expression of support for the IOC and is a disparagement of the MLUA.

The 1995–1999 collective-bargaining agreement between the Employer and Intervenor provided, among other things, for special events bonus money to be paid in two ways. According to the testimony of Campbell, all umpires who worked a special event would be paid for it. This was termed the "working money or working payment." Five of the six umpires who worked the 1999 All Star Game were later among the 22. There is no dispute as to working pay for special events as those umpires who worked the All Star game were in fact paid. The second type of special events pay was termed the "pool pay" by Campbell. This amounts to a payment of $20,000 to all umpires whether they worked a special event or not. Campbell explained that special events under article VII of the contract include the annual All Star Game, the Division Series, the League Championship Series and the World Series.[6] However, Robert Manfred, director of labor relations and human resources and special counsel to the Commissioner's Office, disputed whether the All Star game constituted one of the special events.[7] The pool bonus payment is made annually on or before November 15. The record indicates that this $20,000 payment was not made to any of the 22 umpires in November 1999. The record does not indicate if the failure to pay the pool money to the 22 was known to any of the other umpires.

The next issue alleged to be a unilateral change involves the handling of the crew chief differential pay for those 5 umpires among the 22 who had been crew chiefs.[8] Campbell testified that for the 1999 season, there were eight American League crew chiefs and nine National League crew chiefs. A crew chief has some additional responsibilities for and within his four-person umpire crew. The crew remains constant throughout the season, except for an occasional change due to vacation leave or injury. The crew chief pay differential amounts to $7500 per season, payable on June 1 and August 1 in two equal installments. The five umpires whose disputed resignations were accepted by the Employer effective on September 2 had received both crew chief pay differential payments on time. However, the final paycheck paid during the first week of October for each of these five former crew chiefs was reduced by the amount of the pay differential, which represented the time worked after September 3 through the end of the season. This action of the Employer occurred without notice to the MLUA. There is no record evidence that the crew chief pay recoupment had been disseminated to any other umpires.

The final area where the Intervenor alleges a unilateral change by the Employer concerning the 22 umpires whose status was in dispute involves the Employer's failure to pay these individuals the severance pay provided for in the collec-

[2] The unfair labor practice charge was later withdrawn. It appears an uninvolved member of the public filed a parallel charge, which was subsequently dismissed by the Regional Director. The appeal was denied.

[3] The law firm from Cohen, Weiss, and Simon.

[4] A call Coble received from Phyllis Mehrige, vice president of the American League, concerning his wife's condition was also mentioned on cross-examination.

[5] The Petitioner stipulated that John Hirschbeck was its agent.

[6] Umpires cannot work more than one special event, with the exception of the World Series umpires who may have worked an earlier special event.

[7] The caption of subsec. "A" of art. VII reads "Additional Compensation, Division Series, League Championship and World Series." The paragraph then list the amount to be received by the umpire in the All Star game as well as the other events named in the caption.

[8] Frank Pulli, Terry Tata, Drew Coble, Richie Garcia, and Jim Evans were the crew chiefs whose "resignations" were accepted.

tive-bargaining agreement. Campbell described two circumstances in which the contract provides for payment to umpires upon their separation from employment. Campbell testified that under article VIII severance is paid to qualified umpires[9] whether they are terminated by the Employer or whether they terminate their employment voluntarily. Severance pay was due to be paid between January 1 and 10, 2000. Campbell testified[10] that he had heard rumors that severance pay would not be paid to the 22 in a conversation with a private attorney representing one of the 22. The MLUA then filed a lawsuit, in late July 1999 in Federal court seeking to compel compliance with certain terms of the collective-bargaining agreement, including the severance pay provision. The complaint asserted that the MLUA had learned that the Employer would "withhold the termination benefits" provided in the collective-bargaining agreement from those umpires who had voluntarily terminated their employment.[11]

A second legal action germane to the status of the 22 disputed umpires was filed by the MLUA on August 30, 1999, and was assigned to Federal District Court Judge Joyner of the Eastern District of Pennsylvania, located in Philadelphia. This action sought to compel arbitration to resolve the status of the 22 umpires who were not allowed to rescind their "resignations." The parties in a settlement stipulation provided for, inter alia, arbitration of the status of the 22 and payment of wages and contractual benefits to the 22 through the end of the 1999 season although none of the 22 were to provide services after September 2. The Employer specifically cited paragraph 5 of the settlement stipulation, which states:

> [A]ny member of the umpiring staff of the Leagues as of September 3, 1999, who is entitled to receive, for the 1999 season, a payment pursuant to article VII.A.1 of the Basic Agreement and the parties practice thereunder, may choose to forgo such payment. The Leagues agree to aggregate the payments which such members forego, and provide such sum to the MLUA for distribution to the Umpires and those members who chose to forgo their payment, based on seniority as the Leagues and the MLUA shall agree.

Robert Manfred, executive vice president of labor relations and human resources and labor counsel, employed by the office of the Commissioner of Baseball, testified that he was involved in the 2 days of negotiations leading to the settlement stipulation. He testified that the Employer took the position that the pool bonus payment for special events would be paid only to those umpires employed as of September 3, thus disqualifying the 22 from receiving pool money. He testified that paragraph 5 was the compromise reached on this issue and that umpires receiving the pool bonus pay could agree to forgo receipt of $20,000 and that money would go to the MLUA to be shared with the 22. Patrick Campbell, counsel for the MLUA, disputed the meaning attributed to paragraph 5 by Manfred. Campbell stated that those who opted to forgo payment could include the 22 or any other umpire. He further opined that if any specific "exclusions" were intended by the parties to the stipulation he assumes such exclusion would have been expressly stated. The parties were in agreement that paragraph 5 of the settlement stipulation was never implemented or utilized.

Conversation Between West and Brinkman

The Intervenor contends that a conversation uncovered on the Employer's cross-examination which took place between National League umpire Joe West and American League umpire Joe Brinkman in July after the resignations is pertinent to its objections. West was asked on cross-examination whether he had spoken with Brinkman. West acknowledged that Brinkman urged him to rescind his resignation in order to keep his job. West also acknowledged that Brinkman had said if the MLUA got rid of Richie Phillips "they" could probably make a new deal with baseball by Christmas. West's response indicated that this statement perplexed him because he states that he then asked Brinkman how he could have a deal by Christmas when we were still the bargaining agent. The cross-examination and subsequent redirect never elicited any response that may have been made by Brinkman or any further details of the conversation. As noted previously, Brinkman was not called to testify in this matter.

Poncino's and Mark Hirschbeck's Conversations

Larry Poncino worked as a National League umpire for 8 years prior to receiving notification that his resignation had been accepted by the Employer to be effective on September 2. Poncino testified that he has known umpire Mark Hirschbeck, brother of American League umpire John Hirschbeck, for 16 or so years. Poncino said he met him in the minor leagues. In the last days of September, Poncino was in the back yard of his home when he received a telephone call from Mark Hirschbeck. Mark Hirschbeck told Poncino that he was part of an organization to form a new union to represent the umpires. Poncino explained that he was totally against forming a new association. He said if Hirschbeck and the others in this grass roots group wanted to form a new association, all they had to do was call a meeting of the MLUA and vote for a change in leadership. Poncino stated that he felt there was no need to decertify the Union whatsoever. Hirschbeck said they were going full steam ahead and their position was to oust Richie Phillips and form a new group. Hirschbeck offered his opinion that the resignations were a "stupid" idea and it was time for a change. Poncino praised "what they (the MLUA) did for 22 guys on September 2nd." He added, "[C]an you imagine what the fight would have been for all 58 of us or 66 of us if we had stuck together?"

Mark Hirschbeck testified to this conversation as well. Hirschbeck testified that he called Poncino because they were friends and he was concerned about the resignation strategy of the MLUA. Hirschbeck told Poncino that he was "basically fed up" with Richie Phillips as the attorney. He said everything Phillips did was negative and that Phillips had a reputation for "pissing people off." Hirschbeck said he didn't want to go in that direction any more. He felt that they could have gotten a better lawyer "out of the phone book." Poncino replied that he was very happy with Phillips. Hirschbeck said he was with the IOC and they were heading in a new direction. Poncino replied that the Independent Organizing Committee was going to hurt the 22 who were heading for arbitration. Hirschbeck disagreed with that assessment claiming that they would have a better

[9] The contract provides for payment to umpires with 10 years of seniority who voluntarily leave their positions.

[10] On direct examination, Campbell refused to state with whom he had such a conversation, and I therefore struck his testimony. On cross-examination, he again referred to such a conversation but again refused to give attribution.

[11] It notes that the Employer contended the action by the umpires had violated the no-strike provision of the collective-bargaining agreement.

chance to help the 22 with a different approach than Phillips' approach.

Poncino relates a second telephone conversation he had with Mark Hirschbeck that took place a couple of days later. Poncino said this call took place just prior to the MLUA's October 4 general membership meeting. He noted that all of his conversations with Hirschbeck were very civil. Hirschbeck stated in this call that he wanted to make Poncino feel at ease. He said that no matter what happened, Poncino was one of the guys "they" want back. Poncino asked who had told this to Hirschbeck. Hirschbeck replied that he could not tell Poncino who gave him that information. Hirschbeck added that with Richie Phillips gone the deal that they had was the severance would be increased to $500,000 or $550,000, and five-person umpire crews would be installed. He also raised giving up some first-class travel to achieve an increase in per diem. Hirschbeck told Poncino that with Richie Phillips gone "within 72 hours we could have this deal done." Poncino replied that they already had first-class travel and why would they want to give that back and they should get per diem increases without any givebacks. He noted that once the givebacks started "they would give it all back." Hirschbeck responded that for an hour he would sit in the back of the bus and he wasn't worried because they had enough upgrades to fly first class anytime they wanted. When Hirschbeck mentioned a deal could be done within 72 hours of Phillips departure, Poncino asked how Hirschbeck could know this. Hirschbeck replied, "Trust me Moose, on my wife and kids."

Hirschbeck presented a significantly different version of this second conversation that he had with Poncino. In this conversation, Hirschbeck recalls stating that they could do better in a negotiation than Phillips because as he had said before, Phillips had a tendency for "pissing people off." Hirschbeck also said their per diem and severance could go up. He said, regarding airline travel, "we can downgrade and go into our per diem by downgrading our tickets." Hirschbeck stated that the conversation turned to a review of the major contract benefits that they had. Hirschbeck also recalls telling Poncino that he felt that Poncino and the younger guys among the 22 had a better chance of getting their jobs back if the Employer went to the five person crew opening more jobs because Poncino was a good umpire. Hirschbeck specifically denied telling Poncino that he knew of a deal to get Poncino back. He categorically denied telling Poncino that he swore on his kids to prove it. Hirschbeck explained that his wife had been collecting all articles regarding umpires from the Internet and that he had read various articles that dealt with issues such as five-person crews and per diem and travel.

Poncino reported this second conversation that he had with Mark Hirschbeck concerning the crew size increase, severance, and per diem increases and the deal could occur in the absence of Richie Phillips on the floor of the Chicago meeting on October 4 in front of some 50 umpires, including 3 who were with the IOC. Later Poncino also reported this conversation to MLUA Counsel Campbell. After Poncino reported the contents of the conversation with Mark Hirschbeck to MLUA Counsel Patrick Campbell, Campbell suggested Poncino ask Hirschbeck if he would testify to this possible deal at the arbitration hearing of the 22. Thus, early on the morning of November 1, at about 8 a.m., Poncino called Hirschbeck from the golf course. Poncino told Hirschbeck that the arbitration for the 22 was scheduled to begin in a matter of a few days. He asked if Hirschbeck would be willing to testify at the arbitration concerning the things he had said about a deal being done in 72 hours if Richie Phillips was gone and it would include increased severance, giving up first-class travel for per diem, and five-man crews. Poncino testified that Hirschbeck said he would have to deny that the conversation took place. Poncino asked why they were going through with the decertification vote because they could just vote Phillips out, but don't decertify the Union. Poncino added, "Why do you and John want to go through with this?" Hirschbeck replied that the boat was at the dock and if Poncino wanted to get on he should do so now as the boat was ready to leave the dock.

Hirschbeck testified to the November 1 call he had received from Poncino. He relates that Poncino referred to the things he had mentioned about "per diem and air fares and all that" and asked if he would testify in Philadelphia at the arbitration hearing for the 22 guys. Hirschbeck asked, "What am I going to testify about, Larry? It's only my opinion." Hirschbeck stated that he hadn't heard any of it from anybody. He said, "[I]t's just my opinion, so I have no reason to testify. I can't testify about myself."

Poncino raised this once more on the November 7 conference call from the Tucson charity golf tournament for which he was the honorary chairman. The call initiated by the IOC involved some 50–60 individuals, mostly umpires, and was to address Joe West's argument about the "scratch bargaining" issue that had arisen and which is discussed below. Poncino again questioned Mark Hirschbeck about the contract claims Poncino asserts Hirschbeck had made to him in the early October call. Poncino said that Hirschbeck had told him that he would have to deny he said these things and would have to lie. Hirschbeck asked Poncino if he was calling him a liar. Poncino retorted that Hirschbeck had told him the truth when he said he would lie. The version of this call was testified to by both Hirschbecks and their testimony is generally consistent with Poncino's version.

IOC Files Petitions Seeking an Election

On October 12, 1999, counsel for the Major League Umpires Independent Organizing Committee filed the instant petitions (Cases 2–RC–22142 and 2–RD–1440), seeking an election in the unit set forth above.

The record establishes that 14 individuals, including Joe Brinkman, John Hirschbeck, Mark Hirschbeck, Tim Wilkie, Jim Reynolds, Mike Everett, Jim Joyce, Tim McClellan, Larry Young, and others, joined together to establish the IOC as a labor organization. Only Joel Smith, a labor attorney from Baltimore, Maryland, is paid by the IOC. Ron Shapiro, also an attorney, has served as an unpaid advisor. Karen Brinkman, wife of Organizer Joe Brinkman, has assisted the IOC by taking notes and answering the phone for her husband although she is not a professional secretary. The evidence establishes that the IOC was voted into existence on September 10, 1999, and John Hirschbeck testified that it began to function on September 12, 1999.

West Conversation with McKean

Joe West, a veteran of 22 seasons as a National League umpire, was described as a strong supporter of the MLUA and has served on several committees, most recently heading the Pension and Health Benefits Committee. Around November 3,

1999, West, Terry Tata, Jeff Kellogg, and Sam Holbrook[12] attended a meeting called by the IOC in a hotel in downtown Baltimore as representatives of the MLUA. West testified that approximately 30 umpires and Attorneys Joel Smith, Larry Gibson, and Ron Shapiro were present. West informed the gathering of his role as MLUA rep and stated that his instructions were to talk about the upcoming arbitration for the 22 and to try to mend fences because of the split in the group. West testified that he spoke from the floor via the open microphone for about 4 to 5 hours and asked questions and engaged the group in discussion. The issue of a lockout was one of the topics brought up by West because he believed that the Employer's representatives at a meeting in Philadelphia had indicated there would be a lockout. Attorney Shapiro and John Hirschbeck both stated that if the umpires went with the IOC they would negotiate; there would not be a lockout. West viewed these comments in this way: "I mean that was their speech, that was their rallying cry."

Late in the day, in the hallway near the luncheon banquet room, West had a conversation with fellow umpire Jim McKean. McKean told West that if he voted for the IOC that "we would not be locked out January 1." West asked McKean how he knew that. McKean replied, "[T]rust me." West said, "What do you mean trust you; somebody has to be telling you this." McKean replied, "Yeah, just trust me." McKean was not 1 of the 14 organizers of the IOC and there was no evidence that he had authority to speak as a representative of the IOC. Further this conversation was a private one with West and there were no representatives of the IOC who heard the statements he made to West and ratified them. West called McKean a "big proponent" of the IOC.[13] West repeated this conversation to Kaiser, MLUA President Jerry Crawford, Steve Holroyd, attorney for the MLUA, and Pat Campbell, another attorney.

Kaiser conversations

An umpire of 23 years, Ken Kaiser testified in rapid fire to several conversations pertinent to the Intervenor's objections. He was directed by counsel for the Intervenor to a conversation with Jim McKean sometime in early December, after the ballots were counted in the instant election. Kaiser has known McKean for about 30 years. Kaiser expressed an opinion that McKean was with the IOC from the "beginning." Kaiser based this opinion on the fact McKean voted to relieve Richie Phillips of his position as counsel to the MLUA in early February 1999 and abstained in the July vote on the resignation plan. Kaiser did not address the hearing officer's question about conversations with McKean about his membership in and authority to act on behalf of the IOC. He recalled McKean saying to him once, at a time not identified on the record that "baseball will not deal with Richie Phillips." Kaiser stated that McKean told him that he plays softball in Tampa, Florida, with Baseball Executive Sandy Alderson's father. There were no other details to this conversation. Kaiser then related a conversation with McKean by cell phone from Philadelphia or Baltimore with Joe West standing there. McKean told Kaiser that the IOC had the smartest lawyers, Smith and Shapiro, and told Kaiser "you've got to go our way." McKean added, "Well, they're not dealing; we've got the power now, you're going to have to go our way now."

Kaiser also referred to a conversation with McKean in November in a hotel lobby as they got ready for the arbitration. McKean said, "There's this guy named Nelson, and I've never met this guy, but I think he works for Sandy Alderson. As a matter of fact, I think he's like liaison between the umpires or something." Kaiser continued to relate his recollection of McKean's statement to him: "And he said, Nelson told me way back, way back now, I can't give you a date, way back that there's a deal in place ninety percent as soon as we oust Phillips."

Finally, Kaiser related a conversation he had at the urging of umpire Dave Phillips with IOC Attorney Joel Smith. Kaiser said he was very concerned about the 22 and asked Smith what they were going to do about the 22. Smith informed Kaiser that the 22 will not be the main issue for the IOC. They would first get a contract and only when the contract was done would they deal with the 22. Kaiser disagreed with that strategy and said shouldn't the 22 be the first priority. At that point the conversation ended with an apparent agreement to disagree.

Kaiser impressed me as a very sincere and honest individual but he clearly had difficulty with this apparently novel experience of testifying at a hearing. He was able to relate what he knew about McKean's role with the IOC but when it came to the various conversations he had he blurted them out in a rapid fire fashion and rambled through a recitation of fragmented details of portions of the conversations. The Intervenor's counsel was unable to direct him to specific events and he strayed far from the questions he was asked. Thus, counsel was unable to lay foundations for the various conversations that Kaiser related. Kaiser testimony concerning the various conversations he may have had therefore proved unreliable and not very probative.

The dismissal of four former umpires

The Intervenor finally urges that the postseason dismissal by the Employer of four former umpires, three of whom were formerly officers of the MLUA on the eve of its October 4 general meeting be considered. The Intervenor urges me to conclude that these "discharges" are evidence of the Employer ridding itself of "sympathizers" of the MLUA in order to further its campaign to disparage the MLUA. However, there is no evidence on the record that these four individuals remained supporters of the MLUA after they commenced their employment with the Employer. Neither is there any evidence as to any of the reasons that led the Employer to dismiss these four individuals, or even if they were in fact dismissed. Thus, despite the proximity of the "dismissals" of these four former officials, to the October 4 MLUA meeting, there is no basis for me to draw any conclusions concerning this circumstance even assuming that such discharges may be considered herein in the absence of an unfair labor practice charge.

Analysis

The Intervenor urges me, and ultimately the Board, not to be surprised by the paucity of conduct that occurred during the critical period. Counsel notes that the Employer and Petitioner were sophisticated and had received advice from exemplary counsel. By acknowledging the startling lack of conduct during the critical period commencing with the filing of the petitions, Intervenor is asking that this election be overturned based primarily (if not exclusively) on prepetition conduct. As set forth

[12] Ken Kaiser was also scheduled to attend a s a representative of the MLUA but his plane was cancelled due to a fog condition.

[13] There is no evidence on the record to support the contention that McKean was a "big proponent" of the IOC.

above, most of such conduct occurred in July 1999, more than 2 months before the Petitioner was established as a labor organization, and 3 months prior to the filing of the instant petitions. The Petitioner and the Employer urge that the inquiry here be limited to those events that occurred within the critical period. Petitioner also argues that the notice of hearing issued by the Regional Director refers solely to events within the critical period and thus the scope of inquiry must be limited to that time frame.

It must initially be determined what, if any, consideration I am authorized to give to the July 1999 and the other prepetition events. Since *Ideal Electric Co.*, 134 NLRB 1275 (1961), the Board has consistently held that the critical period during which the parties conduct will be scrutinized for its impact on employees who voted in an election commences with the filing of the petition. Previously, the Board had considered dates such as the date of election agreement or Board notice of hearing, and later the date of the issuance of the Board's Decision and Direction of Election, as the dates on which the critical period would commence. The Board explained that these dates had been set in order to shorten the period for scrutiny because of the danger that would result from permitting consideration of matters too remote to the election. In *Ideal Electric*, the Board recognized that with delegation of authority in representational cases to Regional Directors, the time between the filing of a petition, and the conduct of the election had been greatly reduced. The Board, in setting the date of filing as the commencement of the critical period, was satisfied that this date would be the appropriate cut off point and would not permit consideration of matters that were too remote to the election during the postelection process. The Board, thereafter, has routinely applied the *Ideal Electric* period as the time frame for review of conduct asserted to be objectionable.

In very limited circumstances, however, the Board will consider conduct that occurred prior to the filing of the petition. In *Dresser Industries,* 242 NLRB 74 (1974), the Board was confronted with a motion for reconsideration after the Ninth Circuit had reversed several of the findings that it had been relied on in ordering a new election. On reconsideration, the Board noted that the record still supported findings of unlawful conduct by the employer's plant manager and several supervisors and it again set the election aside. The Board held that the employer had interrogated an employee, solicited complaints from employees, and threatened employees with a loss of benefits if the union was elected. While all of this conduct occurred prior to the filing of the petition, the Board specifically noted that the employer, within the critical period, also engaged in an unlawful interrogation and promise of benefits to an employee previously threatened and that the prepetition conduct continued within the critical period. Therefore, the Board held in *Dresser* that the rule in *Ideal Electric* does not preclude consideration of prepetition conduct where it "adds meaning and dimension to related postpetition conduct." The Board specifically noted that, "[F]urther examination of Respondent's prepetition conduct reveals that the critical period interrogation of and promise of benefits to [an employee] by a supervisor was a continuation of Respondent's earlier attempts to thwart unionization." Id. at 74.

While the Board will consider prepetition conduct that is directly related to postpetition conduct, it is also well established that the Board will generally not set aside an election based solely on conduct which occurred prior to the petition. See *Data Technology Corp*., 281 NLRB 1005, 1007 (1986). However, there are limited exceptions to this premise as well. In *Gibson's Discount Center*, 214 NLRB 221, 222 (1974), the Board held that where a union has made promises outside the critical period to waive initiation fees as proscribed by the Supreme Court in *NLRB v. Savair Mfg. Co.,* 414 U.S. 270 (1973), it will set aside the election. The Board noted the unique circumstances surrounding the *Savair* waiver, which necessarily occurs prepetition and thus impacts the very filing of the petition. Thus the impact of this particular type of prepetition conduct lingers on throughout the election process. The Board emphasized that its decision in *Gibson's Discount,* 214 NLRB at 222 fn. 3, was required by the unique circumstances of the case and stated that it did not intend any broad departures from *Ideal Electric* as a result of that decision. Similarly, the Board, in *Lyon's Restaurants*, 234 NLRB 178 (1978), set aside an election based on a union representative's prepetition statement to employees that they had to join the union or they would not work. There, the Board concluded that employees had a reasonable belief that the union had the power to affect their employment. The Board stated that the facts of this case were very similar those in *Gibson's Discount*, supra, to warrant the same exception to the stringent policy set forth in *Ideal Electric.* Also in *Royal Packaging Corp*., 284 NLRB 317 (1987), the Board set aside an election won in a close vote by a petitioner where the union representative, who was married to a supervisor of the employer with hiring authority, promised a voter that if she and her daughter signed union authorization cards, the daughter would be rehired from a 6-month layoff. The Board held that in these circumstances, especially where the daughter was reinstated on the day after she signed the authorization card, employees could reasonably conclude that the union had the authority to deliver on its promise of economic benefit. As this promise, while not a waiver of union fees, was similarly a promise of economic benefit in exchange for signing a union authorization card, the Board considered this evidence grounds to overturn the election although the conduct occurred outside the critical period.

The Board has also held that unremedied, prepetition conduct which constituted unlawful assistance under Section 8(a)(2) of the Act for one of two competing unions was an appropriate basis to set aside an election. See *Weather Seal Inc.*, 161 NLRB 1226, 1229 (1966).

Based on the applicable legal standards for dealing with objectionable conduct, it appears that if no objectionable conduct occurred within the critical period or if the prepetition conduct did not affect or give meaning to actions taken in the critical period then the prepetition conduct presented here is irrelevant. Only if the critical period objectionable conduct can be given meaning and dimension by the previous conduct, can I consider the prepetition conduct. The Board's decision in *Royal Packaging*, supra, does not provide a basis to consider the July 1999 conversations between Coble and Hirschbeck. The statements made by Brinkman and John Hirschbeck, both later to become organizers and agents of the IOC, regarding the consequences of immediately rescinding resignations made to Coble[14] are unlike *Savair* waivers. The impact of the *Savair* waiver contin-

[14] I am writing this section from the view that Coble's version is fully credited that he was told to disavow the MLUA and rescind the resignation and in exchange a deal was in place with Commissioner Selig to take care of his job.

ues to affect the election into the critical period. The promise made to Coble was not a promise of economic benefit in exchange for a signed authorization card. Moreover it was not one that Coble would reasonably believe was within the power of the IOC or its organizers to grant. Nor can they be attributed to the IOC, which had not yet been organized as a labor organization.

As the Intervenor's objections allege Employer's conduct only with regard to the failure to make certain contractual payments, I will turn to that aspect of the objections first. The Employer is alleged to have failed and refused to pay certain contractual benefits to the 22 disputed employees. This is conduct the Intervenor calls "unilateral changes." It appears that only the failure to pay the special events pool money actually occurred within the critical period. While the Intervenor couches its argument in this regard in terms reserved for unfair labor practice proceedings, I note that the Board as a general rule will not litigate unfair labor practices in representation proceedings. I must therefore analyze only whether the Employer's failure to make these contractual payments constituted objectionable conduct by expressing the Employer's support for the IOC or by disparaging the MLUA.

The Employer at all times prior to the August lawsuit to compel arbitration took the position that the pool money due on November 15 was payable only to those umpires employed as of September 3. While another employer may well have prorated this benefit and not given it solely to those working at the end of the season, the Employer's position, while harsh, is certainly a matter for interpretation of the contractual language. Eligibility for this benefit appears to turn, at least in the Employer's view, on the status ultimately accorded to the 22 by the arbitrator. The Employer also emphasizes that the settlement stipulation entered into by the parties in resolving the lawsuit contained a provision permitting those who receive the bonus to forgo their share and redistribute it. While MLUA Counsel Campbell disputed this interpretation of the settlement, it is evident the parties had discussed this matter.

Another action of the Employer that the Intervenor categorizes as a "unilateral change" involves the eligibility of the 22 for one or the other of the severance payments under the contract. While this payment was not due until January 2000, well after the election had been conducted, the MLUA took the position that there was a clear repudiation of this obligation to pay severance prior to the petition. The MLUA took the position that the 22 were entitled to one of the severance payments (voluntary or involuntary separation) if the arbitrator either found them to have resigned or been discharged. The Employer points out that there was a third possibility: the arbitrator could reinstate the 22 and they would not be eligible for severance pay.[15] This issue is replete with contractual interpretation issues and facts dependent on the arbitrator' decision.

The remaining "unilateral change" issue involves the crew chief pay. The Employer had previously paid the entire amount of the crew chief differential for the season to the 5 crew chiefs among the disputed 22. A dispute arose when the October paycheck[16] for the five crew chiefs was reduced by the amount representing the September differential. As the arbitration proceeding is now underway and will determine the status of the 22, it is clear that, in the event the arbitrator holds that the 22 were improperly removed from their positions, the make-whole remedy will provide for payment of the differential. On the other hand, if the arbitrator rules that these individuals had resigned, they may well not be entitled to the differential from the date of their separation.

In a representation case, I am, of course, without authority to recommend to the Board how it should deal with these contractual issues in an unfair labor practice context. However, it seems unlikely that the Board would find an 8(a)(5) unilateral change in these circumstances where an employer's action was consistent with a reasonable interpretation of the collective-bargaining agreement.[17] Nevertheless, regardless of how the Board would view this conduct as an unfair labor practice, I cannot agree with the Intervenor's argument that objectionable conduct occurred[18] because the unfair labor practice matter is not before me in this proceeding. Intervenor raises a second argument regarding this conduct. It asserts in its brief "[t]hese actions, coupled with the statements of Petitioner during the campaign, convey an unassailable impression: a vote for Petitioner will result in harmonious and beneficial bargaining, while a vote for the MLUA would result in continued disparate and harsher actions against umpires." Contrary to Intervenor's contention, however, a review of the record before me as set forth above, establishes no support for this argument. It has been asserted that the Employer is blatantly anti-Phillips and anti-MLUA, but the record is silent in this regard. I am unable to conclude and recommend to the Board that the Employer's actions concerning certain contractual benefits amounted to objectionable conduct based solely on speculation. Indeed, the evidence supported the conclusion that the Employer's conduct was based on its reasonable interpretation of its obligations under the collective-bargaining agreement. Moreover, the MLUA was reasonably aware of the Employer's position on these matters and sought declaratory relief from the district court in July and later sought to compel arbitration of the dispute in August. The failure to pay benefits to the 22 flow directly from the disputed status of these 22 employees. Thus, I conclude that the failure to pay the contractual benefits to the 22 employees is an essential element of the issue of whether they remained employees after September 2. Moreover, the failure to pay the benefits due to employees occurred when the Employer accepted the resignations and this was outside of the critical period. Accordingly, I recommend that the Intervenor's objection in this regard be overruled.[19] The evidence fails to establish that the Employer's action was taken or had the effect of influencing the election. Finally, it occurred outside the

[15] The Employer points out in its brief that Campbell opined on the witness stand that the Employer didn't make the payment because it didn't want to be in a position to seek repayment in the event it lost the arbitration.

[16] The settlement stipulation provided, among other things, that the 22 umpires would be paid for the remainder of the 1999 season, although they would not work. The stipulation was silent on the crew chief differential.

[17] See *NCR Corp*., 271 NLRB 1212,1213 (1984), and the cases cited there.

[18] The Intervenor cites *Accurate Die Casting Co*., 292 NLRB 982 (1989), which involves only unfair labor practices and is not an objections case and *Super Thrift Markets,* 233 NLRB 409 (1977), which involves consolidated unfair labor practice and objections cases.

[19] The only other conduct attributed to the Employer by the objections is its dismissal of the four former MLUA officials from their jobs with the National League office. As noted above, there was no evidence submitted on this objection other than the timing of the dismissals to a MLUA meeting.

critical period and as such could not be considered objectionable conduct.

Turning now to the conduct the Employer attributes to the Petitioner that occurred during the critical period, the Intervenor relies on the November 3 conversation between Joe West and Jim McKean at the IOC meeting in Baltimore. At the end of the meeting umpire Jim McKean, who was called a supporter of the IOC, spoke to West who had appeared at the meeting as a delegate of the MLUA. McKean told West that if he voted for the IOC they would not be locked out. West asked how McKean knew this and McKean said, "[T]rust me." West pressed and said someone must have told him that. McKean replied, "Yeah, just trust me." The evidence submitted in support of McKean's status as an agent was minimal. John Hirschbeck testified without contradiction that McKean was not 1 of the 14 organizers of the IOC. Kaiser testified that McKean had voted against Phillips at the February 1999 MLUA meeting. However, he also said that McKean had abstained in the ratification vote on the resignation plan in July. It is hard to conclude anything about McKean from this evidence, except possibly he wasn't sure where he stood in July. The record is silent about any activity of McKean in support of the IOC either before or after the IOC was established. However, assuming McKean was found to be an agent of the IOC, a fact not established herein, the conversation he had with West is ambiguous at best and is not a basis to overturn the election. To put this comment in context, McKean had listened to West represent the MLUA's interests and articulate the MLUA's arguments throughout the 4 to 5 hours of the session. He had most likely heard the discussion on the floor of the meeting that West had related. West said Brinkman and Hirschbeck had exclaimed what he termed the "rallying cry" of the IOC: they would negotiate and not be locked out. Significantly, the lockout issue raised by West had been discussed on the floor by the IOC leaders without any claims of any "assurances" from management that there would be no lockout. McKean spoke to West in the hallway at the end of the meeting. McKean's "trust me" response can be viewed either as his expression of confidence that the new approach advocated by the IOC would have better results than the more aggressive approach of the MLUA or it implies some inside information of a secret deal. Either explanation is plausible. As such, this statement is rife with ambiguity and is not sufficient to overturn the election.

The evidence in the record is insufficient for me to recommend that any other conduct within the critical period forms the basis for finding objectionable conduct. The testimony provided by Kaiser may relate to postpetition conduct by McKean. However, as noted above, this testimony was not sufficiently probative and should not be relied on. The final two conversations between Poncino and Mark Hirschbeck, an IOC organizer and agent, took place within the critical period. There is a credibility dispute between Poncino and Mark Hirschbeck as to the three prepetition conversations in which Poncino testified he was told by Hirschbeck of certain agreements already reached on contract terms and that a deal was imminent if Phillips was gone. Poncino asked Hirschbeck about this conversation within the critical period when he asked Hirschbeck to testify about the conversation at the arbitration hearing on behalf of the 22. The versions are dramatically different in that Hirschbeck stated that he would not testify because the statements he made were his own personal opinions and Poncino stated that Hirschbeck said he would have to deny the conversation. The matter was again raised in the IOC sation. The matter was again raised in the IOC generated November 7 conference call to discuss the MLUA campaign issue on the effect of decertification on negotiations and whether bargaining would begin from scratch if the MLUA was voted out. There were some 70 participants, mostly umpires, to this call. At some point Poncino again asked if Mark Hirschbeck if he would testify and Hirschbeck said he would have to deny the conversations. Accusations were hurled and the conversation was ended.

The Poncino and Hirschbeck conversations were the most troubling, in my view. Poncino and Hirschbeck both appeared to be reliable and credible witnesses. However, it appears that Poncino fervently believed that Hirschbeck was telling him the truth and that a secret deal was in the works. Poncino raised this with the MLUA and many other umpires. However, as noted above, I can consider the prepetition conduct only as it bears on the conduct within the critical period. Hirschbeck told Poncino and anyone else listening to the call that he would not testify to Poncino's recitation of their call. As such, Hirschbeck never repeated the claims he had made to Poncino and in fact appeared to have pulled away from them. In this limited situation, where the calls started in the prepetition period and continued within the critical period that it is appropriate to view the pre-petition conduct. While there is a credibility dispute between the two individuals on the substance of the October 3 call, assuming Poncino's recollection to be credited, it appears that Hirschbeck at most was engaging in an exaggeration, or an implied misrepresentation, of the strength of the IOC's bargaining power. Poncino was not convinced and argued the merits of the issues raised by Hirschbeck, issues that had been publicly written about and debated in the press. Hirschbeck's testimony that he said that Phillips was the problem because he antagonized people has a ring of truth. The MLUA was badly splintered starting in February and culminating in a July bargaining strategy that failed to win strong support from the members. After Poncino related his conversation with Mark Hirschbeck to the MLUA, a memorandum from MLUA President Jerry Crawford was sent to the membership discussing the risks in decertification and the loss of representation from the MLUA. "Scratch bargaining" became the campaign issue with assertions made that the IOC in effect would be in a weaker position to start bargaining. Hirschbeck's misrepresentation was addressed and debated fully throughout the election campaign even assuming that a misrepresentation of a material fact had occurred. The Board has held that it will not set aside an election based on such misrepresentations, absent evidence of the use of forged documents. See *Midland National Life Insurance Co.*, 263 NLRB 127, 130 (1982). The Board concluded that employees should be left the task of evaluating the campaign propaganda by themselves. Certainly, here, the employees who were aware of Mark Hirscbeck's statement to Poncino, or Poncino's interpretation of the statements made to him, had the opportunity to seriously and fairly consider which labor organization would likely have the greater bargaining strength. Accordingly, I conclude that even if the conversations occurred as Poncino recalls them, they would not constitute objectionable conduct.

None of the other conversations[20] set forth above relate in any manner to conduct that occurred within the critical period.

[20] The remaining conversations are the Coble conversations in July and the West conversation with Brinkman relating to their resignations.

To the extent that they may have involved some reference to Phillips, they occurred in the context of the resignation strategy and are unrelated to any critical period conduct. As there is no other conduct alleged to have occurred within the critical period, I recommend that Intervenor's objections in this regard be overruled.

Conclusions

It is recommended as follows:

Objection 1 relates to threats by the Employer to act in a harsher manner toward the MLUA if they remain the employees bargaining representative, while promising harmonious and beneficial bargaining if the Petitioner becomes the representative. As set forth above, the evidence fails to establish any conduct on the part of the Employer that would be encompassed by this objection. I therefore recommend that this objection be overruled.

Objection 2 relates to assistance by the Employer to the Petitioner, particularly by bargaining with the Petitioner over terms and conditions of employment. Again, the evidence fails to establish that the Employer bargained with the Petitioner or in any other manner assisted them. I therefore recommend that this objection be overruled.

Objection 3 relates the Employer's failure to bargain with the MLUA during the critical period. This objection appears to relate[21] to the failure to pay contractual benefits to the 22 disputed employees. As discussed above, the failure to pay benefits in the circumstances herein does not constitute objectionable conduct and I recommend that this objection be overruled.

The Intervenor, in an unnumbered objection, contends that the Petitioner engaged in objectionable conduct by advising employees that it was already bargaining with the Employer and described the terms of the already agreed-upon collective-bargaining agreement. As discussed above, based on the evidence of the Petitioner's conduct within the critical period, I recommend that this objection be overruled.

IT IS FURTHER RECOMMENDED that a certification of representation be issued.[22]

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[21] The MLUA requested bargaining with the Employer by letter of its attorney dated October 27. Bargaining took place in November. It does not appear that the Intervenor is alleging a refusal to meet and bargain here.

[22] Pursuant to the provisions of Sec. 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D.C., within 14 days of the issuance of this report. The party filing exceptions must file eight copies thereof. Immediately upon the filing of exceptions, the filing party shall serve a copy of its exceptions on each of the other parties, and shall file a copy with the Regional Director for Region 2.